No. 12070, 12071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

APPELLANTS' BRIEF.

DAVID SOKOL,
709 H. W. Hellman Building, Los Angeles 13,
PACHT, WARNE, ROSS & BERNHARD, and
ISAAC PACHT,
BERNARD REICH,
HENRY ATTIAS,
9700 Wilshire Boulevard, Beverly Hills,
Attorneys for Plaintiffs-Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

PAGE

MISCELLANEOUS

STATUTES

TEXTBOOKS

No. 12070, 12071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

APPELLANTS' BRIEF.

Statement of Jurisdiction.

This brief will cover two appeals taken from cases consolidated for trial below, and by stipulation, consolidated on appeal in so far as the rules of this Court permit. The cases are identical as to the general facts and law issues. Fact references, however, will be made primarily to the transcript of the Record in *Glenn, et al. v. Southern California Edison Company,* No. 12070.*

---

*Reference to the *Glenn* case will be made by "R....."; reference to the *Drake* case will be made by "Drake R....." The order consolidating the cases for trial will be found in Drake R. 14. The stipulation consolidating the cases on appeal will be found in R. 336.

The first complaint was filed March 19, 1945, setting forth an action by employees against their employer for overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. A., §201, *et seq.*).

Following the enactment of the Portal-to-Portal Act of 1947, (Act of May 14, 1947, c. 52, 61 Stat. 84; 29 U. S. C. A. §251, *et seq.*), plaintiffs filed their third amended complaint on September 2, 1947 [R. 103]. Issue was joined by the defendant's answer to this pleading [R. 131]. Trial by jury was demanded [R. 219; Drake R. 76].

Section 16(b) of the Fair Labor Standards Act confers jurisdiction upon the District Court of the subject matter of the actions.

The District Court (Hon. William C. Mathes, District Judge), on May 18, 1948, granted defendant's motion for summary judgment and ordered the actions dismissed [R. 329; Drake R. 100].

Judgments of dismissal were signed and filed on June 8, 1948 [R. 331; Drake R. 103]. No findings of fact, conclusions of law or opinion were made or filed, except as the District Court's ground for dismissal may be set forth in its orders [R. 329; Drake R. 100].

Notices of appeal were filed by plaintiffs on June 29, 1948 [R. 334; Drake R. 106]. Defendant does not appeal from the said judgments.

This Court's jurisdiction to review is not questioned.

Concise Statement of the Case.

There follows under this heading a short, undocumented statement of the facts and the questions involved. A detailed statement with record references will follow under a subsequent heading.

These cases concern the right of employees to recover overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947, for work performed by the plaintiffs for the defendant. The work for which compensation is sought was performed prior to May 14, 1947.

Defendant is a public utility engaged in the generation, distribution and sale of electric power in interstate commerce. Plaintiffs, who were employees of the defendant, fell into four categories of employment:

(a) Substation operators and attendants;
(b) Relief substation operators and attendants;
(c) Hydro employees;
(d) Primary service men.

Except for the primary service men, most of the employees worked and lived in remote, lonely and out-of-the-way places on the property of the defendant. They were required by their employer to remain on duty for 24 hours of the work day.

The relief operators and attendants were required to travel from station to station and stay overnight away from their homes and families while performing 24 hour duty at successive stations for one or more days at a time.

The primary service men worked generally on 8 hour shifts, but at the termination of the particular shift, they were required to remain at their homes in order to be available to respond to emergency calls. They were paid

for "call-outs", but they were not paid for answering or disposing of matters over the telephone.

Quite apart from custom and practice, the plaintiffs were employed pursuant to instructions of the defendant, designated Order No. A-36, which order provided for a 40 hour work week with the following provision as to overtime: "Overtime for employees on a monthly rate of pay shall be paid at one and one-half times the average annual hourly rate. . . ."

Plaintiffs contend that they are entitled to 24 hours of pay for each day that they were on duty for that length of time. Defendant contends that it may divide the duties of plaintiffs into "active" and "inactive", and that it may compress both types of duties and evaluate them at but 8 hours per day.

Plaintiffs contend that they are entitled to compensation for active and so-called inactive services, both under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947. They contend that throughout the 24 hour tour of duty, the activities were the same and that there cannot be a distinction made between active and inactive duties. On the other hand, defendant contends that there were separable inactive services which were not compensable under the Portal-to-Portal Act.

The parties disagree strongly and decisively as to whether the defendant may avail itself of the defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947.

In these appeals, plaintiffs contend not only that summary judgment will not lie in cases of this kind, but that the trial court is laboring under such misconception of the applicable law that some guidance is needed from this Court if these cases are to be tried.

Specification of Errors.

It is respectfully submitted that the trial court erred:

1. In granting summary judgment to the defendant, in the face of plaintiffs' contention that summary judgment may not be granted under the Fair Labor Standards and Portal-to-Portal Acts where the issues of fact are complex and in dispute;

2. In holding that plaintiffs' activities were not compensable under the Portal-to-Portal Act of 1947, in the face of plaintiffs' contentions that:

(a) Plaintiffs' services were compensable under the Fair Labor Standards Act;

(b) Plaintiffs' services were not affected by the Portal-to-Portal Act;

(c) Plaintiffs' services were compensable under express contract;

(d) Plaintiffs' services were compensable under custom or practice;

3. In failing to find that the defendant did not meet the requirements of the good faith provisions of Sections 9 and 11 of the Portal-to-Portal Act, in the face of plaintiffs' contentions that:

(a) Defendant was not relieved of its obligations by reason of Section 9 of the Portal-to-Portal Act, and

(b) Defendant was not relieved of its obligations by reason of Section 11 of the Portal-to-Portal Act.

4. In failing to find that the application of the Portal-to-Portal Act to bar recovery by the plaintiffs would be an unconstitutional application of the statute, in the face of plaintiffs' contention that they are entitled to recovery under an express contract, irrespective of statute.

Detailed Statement of the Case.

The Pleadings

Plaintiffs' third amended complaint alleged that they were employed by the defendant, which was engaged in the generation, distribution and sale of electric power, at monthly salaries based on 40 hours per week; that they worked in excess of 40 hours per week, but did not receive the compensation required by contract, custom and by law. A first cause of action was stated alleging that plaintiffs' employment was under an "express provision of an oral and written agreement in effect during all of the time of their employment" to pay overtime at the rate of one and one-half times the regular hourly rate [R. 107]. A second cause of action was stated, alleging that "by custom and practice in effect at the time of employment of plaintiffs" all of the overtime work of the plaintiffs was compensable [R. 111]. Plaintiffs prayed for an accounting of the hours worked by plaintiffs, overtime compensation, liquidated damages and attorneys' fees [R. 111].

The defendant, by its answer to the third amended complaint, denied the material allegations thereof and asserted the following affirmative defenses: (a) that there was an understanding between the parties that the monthly salary was to be the only compensation for all services rendered by the employees except for so-called "emergency service" [R. 137]; and (b) that defendant acted in good faith and in conformity with and in reliance upon cer-

tain Interpretative Bulletins, a decision of the National War Labor Board refusing premium pay to employees of another company, and a public statement in a radio broadcast by an official of the Wage and Hour Division that the defendant was operating in compliance with the Fair Labor Standards Act [R. 157-166].

PLAINTIFFS' EMPLOYMENT

The substation operators and attendants were employed at certain stations which the defendant maintained to a great extent in remote, lonely and out-of-the-way places [Deposition of H. L. Anderson, 5]. They lived in homes on the defendant's premises, and were under a duty to be present on the premises of the defendant at all times during the 24 hours of their work day [R. 114]. The substations at which they worked and had their homes were fenced off, and their activities devoted purely to personal pursuits were severely limited [R. 114]. Their duties, roughly, were to inspect the stations each morning, make routine trip tests, take hourly readings, report to central stations, maintain daily logs, and maintain the buildings and grounds in a clean and orderly condition [R. 115; Deposition of H. L. Anderson, 8].

They were required to be present at all times to answer emergency calls and be ready to respond to the exigencies of any situation that arose [R. 116]. They were not permitted to leave the premises of the defendant during their work days [R. 117]. At all times their personal life was severely interfered with, and their attention was di-

rected to the requirements of their jobs during the full 24 hours of their work days [Deposition of H. L. Anderson, 24]. They were paid a monthly salary, and overtime compensation only for duties which the defendant arbitrarily designated as "extraordinary or emergency active duty" [R. 119]. They were not paid overtime for the total time they were required to be present on the defendant's premises and attend to all necessary duties [R. 120].

The relief operators and attendants had the additional burden of traveling from station to station to relieve the regular operators and attendants. Their regular homes were not on the premises of the defendant and they were compelled to remain away from their homes and families while on duty in remote areas 24 hours per day [R. 120]. While on duty, they were supplied by defendant with small living quarters [R. 115]. Many of the plaintiffs, during the period involved in these cases, began as relief operators and attendants.

The hydro employees were likewise employed, as were the substation operators and attendants, in remote, lonely places where stations of the defendant were situated [Deposition of Clarence Rogers, 2, 29]. They were charged generally with the duty of keeping and maintaining the stations of the defendant in operation [Deposition of Clarence Rogers, 3, 6]. At all times during the 24 hours of each day of their work days, they were required to live and remain on the premises of the defendant, available for whatever duties they might be called upon to perform [R. 145; Deposition of Clarence Rogers, 16]. The presence of the hydro employees on defendant's premises, available for 24 hours per day, made it impossible for them to devote their time to their own personal activities

[Deposition of Clarence Rogers, 10, 11, 14]. They received a monthly salarly purportedly to cover all work performed, and in addition received overtime compensation for the time actually spent in going out on emergency calls [R. 144, 145; Deposition of Clarence Rogers, 25, 26]. They received no compensation, however, for the time during which they were required to be present on the premises of the defendant for the benefit of the defendant [Deposition of Clarence Rogers, 26].

The primary service men worked generally on 8 hour shifts, at the termination of which they could go to their homes [R. 137]; subject, however, to the requirement imposed by the defendant that they remain at their homes in order to be able to respond to emergency calls [R. 138; Deposition of J. D. Borden, 16], or in the event they left their homes, to leave the telephone numbers where they could at all times be reached in order to answer emergency calls [R. 138]. The duties of the primary service men were generally to maintain the lines and all of the equipment connected with the lines in good working condition [Deposition of J. D. Borden, 33]. They were paid a monthly salary purportedly to cover all work performed, and in addition overtime only for the time actually spent on so-called emergency calls [R. 137; Deposition of J. D. Borden, 19].

At Santa Paula, the names of the primary service men were listed as such in the local telephone book, and they were required to take complaint calls at their residences from customers. This was the only office available to customers at night. The men were not paid for receiving these calls, but did receive overtime pay if they went out to perform "emergency services" [R. 138].

ADMITTED FACTS

The facts which are admitted or are not in dispute are as follows:

1. Apart from any custom and practice, plaintiffs were employed pursuant to defendant's Substation Division Order No. A-36 which, in part, reads as follows [Pltf. Ex. 2, pre-trial Drake, R. 172]:

"4. *Classification of Employes*

B. *Field and office employes* are classified and defined as:

(1) *Shift employes,* which includes all classes of plant operators, guards, watchmen, and any other employe that may be temporarily assigned to this classification.

(4) *Week-period employes,* which includes station attendants and any other em-employe who may be temporarily assigned to this classification.

5. *Hours of Labor*

B. *Field and office employes*

(1) For *shift employes* the regular hours of work shall be any scheduled eight hours in a work-day. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days per work-week. The work-week is established as starting Monday and continuing through the following Sunday.

(4) *Week-period* employes have no regular scheduled working hours and are subject to call twenty-four hours per day on each day worked. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days a work-week. The work-week is established as starting Monday and continuing through the following Sunday.

8. *Overtime compensation*

C. Overtime for employes on a monthly rate of pay shall be paid at one and one-half times the average annual hourly rate (see paragraph C3 following) except that, if working conditions permit, such overtime may be compensated for by either:

(1) Requiring employes to take equivalent time off within the same work-week, or

(2) Requiring employes to take time off in a subsequent work-week, but within the same pay period (1st to 15th, or 16th to the end of the month) on the basis of one and one-half hours off for each hour of overtime previously worked.

(3) *Average annual hourly rate of pay:* With respect to an employe paid on a monthly salary basis, the monthly salary is subject to translation into its equivalent weekly wage for the purpose of payment of overtime and holiday compensation by multiplying the monthly salary by 12 (the number of months in a year) and dividing the result by 52 (the number of weeks in a year). The hourly rate is then determined by dividing the weekly wage by the normal scheduled working hours in each week."

2. Substation operators and attendants had no scheduled hours of employment, but were required to live on defendant's property for at least 5 days each week and to be available at all times, day or night, to render emergency services [R. 50, 140].

3. Hydro station attendants had no regular hours of employment, but were required to live on the property of the defendant during their working week and to be available at all times, day or night, for each day of their working week to render emergency services, if and when required [R. 145, 231, 234].

4. Primary service men had 8 hour shifts per day for 5 days during the week, but after the conclusion of their shifts, were required to leave a telephone number where they could be reached in order to be available at all times for emergency calls [R. 53, 137, 227].

5. Primary service men were paid a monthly salary and overtime for services performed during emergency call-outs during off-shift hours. They were not paid anything to receive telephone calls, nor for any of the time they were required to be available to respond to emergency calls [R. 138].

6. Substation operators and attendants were paid a monthly salary and overtime for services performed for emergency call-outs during the night time hours. They were not paid for any time during which they were required to be present on the defendant's premises available for call [R. 139].

7. Hydro station attendants were paid a monthly salary and overtime for services performed on emergency call-outs during night time hours. They were not paid for any time during which they were required to be present on defendant's premises available for call [R. 143, 144, 238].

8. At Santa Paula the telephone listings and basis for payment was as has been seen [R. 138].

Disputed Facts

The facts in dispute are:

1. The existence or non-existence of an oral and written agreement whereby plaintiffs were employed at a stipulated monthly salary based on 40 hours a week, and were to receive in addition thereto additional compensation at one and one-half times their regular hourly rate for all hours worked in excess of 40 hours per week [R. 107, 118, 137].

2. The existence or non-existence of an agreement between the parties that the monthly salary paid to the substation operators and hydro employees was to be full compensation for all services [R. 142, 314, 320].

3. Whether or not so-called normal "active" services of substation operators and hydro employees required only 2 to 5 hours per day [R. 45, 50, 139, 234, 304].

4. The existence or non-existence of an agreement that the parties had agreed that an evaluation of the total hours

of work devoted to the defendant, consisting of both active and inactive duties, was the equivalent of 8 hours per day or 40 hours per week [R. 50, 80, 144, 304].

5. The existence or non-existence of a custom or practice that all hours in which plaintiffs were available for duty were compensable [R. 111, 154, 175, 314].

6. Whether or not plaintiffs were required by the defendant to record on weekly time sheets only 8 hours per day normal working time, notwithstanding they worked in excess of 8 hours per day [R. 91, 96, 313].

7. The existence or non-existence of an agreement between the parties whereby a designation was made between so-called "active" and so-called "inactive" duties of the substation operators and hydro employees [R. 139, 304].

8. Whether or not the defendant acted in good faith and in conformity with and in reliance on (1) Interpretative Bulletin No. 13, (2) a decision of the National War Labor Board involving employees of the Pacific Gas and Electric Co., and (3) the public statement of the Southern California manager of the Wage and Hour Administrator [R. 157-166, 297, 298].

ARGUMENT

POINT I

Summary Judgment May Not Be Granted Under the Fair Labor Standards or Portal-to-Portal Acts Where the Issues of Fact Are Complex and in Dispute.

Cases arising under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947 are generally concerned with complex fact situations and are consequently not subject to summary judgment.

Kennedy v. Silas Mason Co., 334 U. S. 249, 92 L. ed. (Adv. Op.) 989 (1948);

**Twigg v. Yale & Towne Mfg. Co.*, 7 F. R. D. 488 (U. S. D. C. N. Y., 1947).

In the *Silas Mason* case, *supra*, the Supreme Court stated (334 U. S. at 256, 92 L. ed. (Adv. Op.) at 992):

> ". . . No conclusion in such a case should prudently be rested on an indefinite factual foundation. The case, which counsel have described as a constantly expanding one, comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions, we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select

---

*Notwithstanding plaintiffs' own motion for partial summary judgment, their counsel cited the above case to the Trial Court as prohibiting the granting of summary judgment to either party herein. Plaintiffs' motion was therefore in effect withdrawn. In any event, however, the issues of fact were not resolved by reciprocal motions. *Begnaud v. White*, 170 Fed. 2d 323, 327 (C. C. A. 6, 1948).

relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice."

In *Twigg v. Yale & Towne Mfg. Co., supra,* the District Court, in denying a motion to dismiss in a case arising under both the Fair Labor Standards and Portal-to-Portal Acts stated (7 F. R. D. at 491):

"Whether or not certain other claims pleaded in the complaint are properly the subject of suit in this Court in view of the provisions of the Portal-to-Portal Act, is a mixed question of fact and law, which cannot be considered on a motion directed to the pleadings under Rule 12(b)(1) and (6). Further, lack of jurisdiction over the subject matter of a claim is a defense which may be asserted in the responsive pleading. Rule 12(b). An orderly administration of Justice in cases such as this would seem to require that the defense of the Portal-to-Portal Act should be pleaded in the defendant's answer. To determine the issues of fact, which that defense might create, would require a trial of the action

> itself. I do not believe that the question of jurisdiction can, in such a case, be determined in advance of trial, even on a motion for summary judgment based on supporting affidavits. Rule 56. The conflicting statements in the affidavits submitted on this present motion support that conclusion."

In the instant cases, the facts are even more complex, intricate, extensive and difficult than they were in the Supreme Court and other cases cited above. These appeals require this Court of three or more to "pick" its way among "over a score of" depositions, affidavits, answers to interrogatories and other documents. The difficulty is illustrated by an incident below. The trial court made its judgments long before it was discovered that certain of the depositions taken in the cases had not been filed, although the court's decision had apparently been made upon all depositions [R. 356]. We do not intend by this statement to find fault with the trial court in this connection; the fault lies more with counsel. However, it does illustrate, as the Supreme Court has indicated, the difficulty with deciding cases of this kind summarily.

We have already indicated what facts and questions are in dispute. Generally, they concern the employment relationship between the plaintiffs and defendant; whether a contract, custom or practice existed for the payment of overtime; whether the plaintiffs worked more than the eight hours set forth on the time cards; whether plaintiffs were entitled to payment for standby time; and whether the defendant acted in good faith and in reliance upon material and officially binding interpretations and orders of the Wage and Hour Division, or of any administrative ruling of an agency of the United States.

Courts have invariably refused summary judgment where even one of the facts above recited was in dispute.

For example: One of the principal issues in this case is whether plaintiffs in being required to remain on the defendant's premises for 24 hours a day were entitled to overtime compensation, and if so, for how many hours.

In *Skidmore v. Swift & Co.*, 323 U. S. 134, 89 L. ed. 124 (1944), involving firemen who were required to stay on their employer's premises for 24 hours a day, the Supreme Court stated (323 U. S. at p. 136, 89 L. ed. at p. 127):

> ". . . We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts, as are the many situations in which employment involves waiting time.* Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court."

Take the example of defenses urged by defendant under Sections 9 and 11 of the Portal-to-Portal Act: In substance, defendant contends its practices were in accordance with Interpretative Bulletin No. 13 issued by the Wage and Hour Administrator, and that it furthermore relied upon a decision of the National War Labor Board denying premium pay to employees of another company, and on a statement made in the course of a radio program.

---

*See R. 113, 140, 145, herein.

It has been invariably held that these defenses involve mixed issues of law and fact and cannot be properly disposed of by summary judgment.

Sheppard v. American Dredging Co., 77 F. Supp. 73 (U. S. D. C. Pa., 1948);

Camiano v. Rifkin, 77 F. Supp. 363 (U. S. D. C. N. Y., 1948);

Divins v. Hazeltine Electronics Corp., 79 F. Supp. 513 (U. S. D. C. N. Y., 1947);

Halsband v. George A. Fuller Co., (N. Y. City Court, 1948) 14 Labor Cases, par. 64,387, p. 73,023.

In *Camiano v. Rifkin, supra,* the Court stated (77 F. Supp. at 364):

> "Defendant's defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947 . . . must be tried since his good faith has been made a question of fact by the affidavits."*

In *Divins v. Hazeltine Electronics Corp., supra,* the Court, in denying summary judgment stated (79 F. Supp. at 514):

> "Section 9 of the Portal-to-Portal Act of 1947, . . . requires the defendants to prove that they acted *in good faith.* I think that this issue of good

---

*See R. 297, 298, herein.

faith, depending, as it does, upon many factors, should be left to the determination of the trial court upon consideration of all the evidence adduced by both parties. Good faith cannot be established as a simple fact, such as the signature to a document. It is an ultimate fact—a conclusion to be drawn from all the circumstances. Only in rare situations can it be determined upon affidavits."

It would appear axiomatic that summary judgment should not be granted when the facts presented are in dispute.

Aaron Ferrer & Sons v. Richfield Oil Corp., 150 Fed. 2d 12 (C. C. A. 9, 1945);

Burley v. Elgin, J. & E. Ry. Co., 140 Fed. 2d 488 (C. C. A. 7, 1943), aff'd 325 U. S. 711, 89 L. ed. 1886 (1945);

Wittlin v. Giacalone, 154 Fed. 2d 20 (C. A. of D. C., 1946);

Doehler Metal Furniture Co. v. United States, 149 Fed. 2d 130 (C. C. A. 2, 1945).

It will be noted that the District Court did not grant summary judgment requested by the defendant, but dismissed the actions on its own motion [R. 330, 333; Drake R. 100, 105]. The theory apparently was that the District Court did not even have sufficient jurisdiction to grant summary judgment. While we have little quarrel with the *form* of disposition, we must point out that the form adopted by the court below illustrates the inad-

visability of summary disposition of cases of this kind. For, it is well settled that an action should not be dismissed "unless it appears certain that plaintiff is not entitled to relief under any state of facts which could be proved."

Carroll v. Morrison Hotel Corporation, 149 Fed. 2d 404, 406 (C. C. A. 7, 1945);

Dollar v. Land, 154 Fed. 2d 307, 309 (C. A. of D. C., 1946).

If, then, plaintiffs are entitled to recover under any state of the facts which they *could* prove, the District Court could not properly dismiss where there is an allegation of an express, written or oral contract, or an allegation of a custom or practice. It would seem clear that the District Court erred in disposing of the claims of the plaintiffs without the jury trial they demanded, and after three years of intensive litigation in which numerous affidavits, admissions, interrogatories and depositions were had and filed.

It would seem equally clear that the many disputed questions of fact and intricate questions of law should not have been disposed of in this sudden, summary manner. If, however, the court below is correct in its view of the law, it would be better for all concerned to know it now. On the other hand, if the court below is in error, it would greatly expedite the trial of the actions herein were this Court to enunciate the correct principles of law which are applicable to the law issues hereinafter discussed.

POINT II

Plaintiffs' Services Were Compensable Under the Fair Labor Standards Act.

The Fair Labor Standards Act of 1938 provides in part as follows:

> "Sec. 207. Maximum hours
>
> (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."
>
> Act of June 25, 1938, c. 676, §7, 52 Stat. 1063, as amended Oct. 29, 1941, c. 461, 55 Stat. 756; 29 U. S. C. A., §207.

It has been well established that where an employee is required to remain on the premises of the employer in order to be available to perform whatever duties may be required of the employee by the employer, all of the time so spent by the employee for the benefit of and in behalf

of the employer is compensable under the Fair Labor Standards Act of 1938.

> *Armour & Co. v. Wantock,* 323 U. S. 126, 89 L. ed. 118 (1944);
>
> *Skidmore v. Swift & Co.,* 323 U. S. 134, 89 L. ed. 124 (1944).

In *Skidmore v. Swift & Co., supra,* the plaintiffs, firemen, in addition to their regular shift, were obliged to stay on the premises of their employer for 3½ hours to 4 hours per week, at night, in order to answer alarms. For each alarm answered the plaintiff received 64¢. The company provided sleeping and recreation quarters. The lower court, relying in part on Interpretative Bulletin No. 13 of the Wage and Hour Division, held, as a conclusion of law, that this night time activity was not working time under the Fair Labor Standards Act. The Supreme Court *reversed* and remanded, stating (323 U. S. at 136, 89 L. Ed. at 127):

> "For reasons set forth in the *Armour & Co. case* decided herewith, we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. Walling v. Jacksonville Paper Co.,

> 317 U. S. 564, 572, 87 L. ed. 460, 468, 63 S. Ct. 332. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. *Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself.* Living quarters may in some situations, be furnished as a facility of the task and in another as part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." (Emphasis added.)

Plaintiffs here, as was the case of the workers in the *Armour* and *Skidmore* cases, were not waiting for their own convenience or for an opportunity to perform services for which they would be compensated, but were employed specifically to remain and be present at all times on the premises of the defendant employer [R. 140, 145], or to leave telephone numbers where at all times they could be reached in order to perform certain other duties [R. 138].

All of the activities of plaintiff, irrespective of whether designated by the defendant employer as "active" or "inactive," constituted the performance of work purely for the benefit of the defendant and were an integral part of

the very employment for which the plaintiffs were hired. The holdings of the Supreme Court in the *Armour* and *Skidmore* cases clearly compel the conclusion that the plaintiffs were performing "work" within the meaning of the Fair Labor Standards Act, for which work plaintiffs were entitled to be compensated at overtime rates in conformity with the requirements of the Act. Furthermore, it was beyond the power of both plaintiffs and defendant, employees and employer, to enter into any agreement which would have eliminated, as compensable, that portion of the work which the employer arbitrarily held to be "inactive."

> *Johnson v. Dierks Lumber & Coal Co.,* 130 Fed. 2d 115, 120 (C. C. A. 8, 1942).

In the last mentioned case, the Eighth Circuit plainly stated:

> "We do not think the act means that an employer may claim all of an employee's time and compensate him for only a part of it. *An agreement to pay for only a part of the hours which an employee is required to serve is invalid.* The purpose of Congress in enacting the statute cannot be thus frustrated." (Emphasis added.)

POINT III

Plaintiffs' Services Were Not Affected by the Portal-to-Portal Act of 1947.

In the development of judicial construction of the Fair Labor Standards Act, the courts extended the application of the Act to include claims for certain types of so-called portal-to-portal activities which theretofore had not been traditionally regarded as compensable work. The activities consisted generally of efforts preliminary to the performance of the job such as walking to and dressing for the performance of work, and efforts following the conclusion of the day such as washing up, walking from and leaving the job. Under the Fair Labor Standards Act, the courts went far in holding certain of these activities to be work within the meaning of the Act.

Thus, in *Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 123,* 321 U. S. 590, 88 L. ed. 949 (1944), the Supreme Court held that the time spent by iron-ore miners in traveling to and from the face of the mine constituted working time under the Act; and in *Jewell Ridge Coal Corporation v. Local No. 6167 U. M. W.,* 325 U. S. 161, 89 L. ed. 1534 (1945), the Supreme Court held that the time spent by bituminous coal miners in traveling to and from the face of the mine was likewise compensable under the Act.

The Supreme Court reached the most sensational result in *Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680, 90 L. ed. 1515 (1946), where it was held that the time spent by workers in punching in, preparing for work and walking to their working places prior to the beginning of their regular work day constituted work within the meaning of the Fair Labor Standards Act. With this decision, the courts were flooded with litigation, and Con-

gress, taking cognizance of the three decisions, and more specifically, of the *Mt. Clemens* decision in 1946, overwhelmingly enacted the Portal-to-Portal Act of 1947.

It is clear both from the history of the Act and from its preamble that it was intended and designed only to outlaw claims for portal-to-portal activities. There was no public clamor raised by the *Armour* and *Skidmore* cases; the great demand for enactment of the Portal-to-Portal Act came only after and was designed to overcome the decision in the famous *Mt. Clemens Pottery* case, *supra,* which had followed in the wake of the *Tennessee Coal* and *Jewell Ridge* cases.

The discussions in Congress, the various hearings by subcommittees, and all of the publicity involving the *Mt. Clemens* case, indicate that the Portal-to-Portal Act was enacted to meet the situation conjured up by that series of decisions.

> *"The Portal-to-Portal Act of 1947,"* The Bureau of National Affairs, 1-5 (1947); 3 A. L. R. 2d 1097, 1125 (1949).

Thus, Congress, in enacting the Portal-to-Portal Act, found "that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities. . . ."

> Act of May 14, 1947, c. 52, §1, 61 Stat. 84, 29 U. S. C. A. §251.

It is obvious that the specific reference to judicial interpretation and disregard of long-established custom was directed not against the *Armour* and *Skidmore* cases, but to the *Mt. Clemens, Tennessee Coal* and *Jewell Ridge* cases. So the President of the United States in his message to

Congress approving the Portal-to-Portal Act understood the intention of the Act:

> "Section 2 of the Act relates to existing claims. From my consideration of this Section, I understand it to be the intent of the Congress to meet the problem raised by portal-to-portal claims, but not to invalidate all other existing claims. The plain language of Section 2 of the Act preserves minimum wage and overtime compensation claims based upon activities which were compensable in any amount under contract, custom or practice. Various provisions of the Act such as Sections 3, 9, and 12, would be rendered absurd or unnecessary under any other interpretation. Moreover, a contrary interpretation would raise difficult and grave questions of constitutionality." (93 Cong. Rec. 5281, May 14, 1947.)

This position, to wit, that the Portal-to-Portal Act was not meant to apply to claims other than portal-to-portal activities has been supported in judicial opinion.

Central Missouri Tel. Co. v. Conwell, 170 Fed. 2d 641 (C. C. A. 8, 1948), aff'g 76 F. Supp. 398 (U. S. D. C. Mo., 1948);

Mauro v. Malcolm M. Slaughter & Co., (U. S .D. C. N. Y., 1948) 14 Labor Cases, par. 64,299, p. 72,715;

Tricomi v. Palumbo Cigar Company, Inc., (N. Y. Sup. Ct., 1948) 14 Labor Cases, par. 74,438, p. 73,211;

Curtis v. McWilliams Dredging Co., (N. Y. City Court 1948) 14 Labor Cases, par. 64,352, p. 72,-890.

In *Central Missouri Tel. Co. v. Conwell, supra,* the Eighth Circuit stated (170 Fed. 2d at 645):

> "In the instant case there is no claim seeking to recover for time consumed in walking to work or

other activities either before or after the normal working hours. Here the claim is that these employees actually worked many hours in excess of the forty hours permitted by the Fair Labor Standards Act, not for activities of a Portal-to-Portal nature, such as were involved in Anderson v. Mt. Clemens Pottery Company, *supra,* and we agree with the trial court that it was not the purpose of the Portal Act to destroy such claims.

"Section 207 of the Fair Labor Standards Act provides that, 'No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * * for a workweek longer than forty hours * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.'

"We are of the view that this provision of the Fair Labor Standards Act was neither repealed nor so modified as to make it necessary to plead, in an action to recover compensation for time actually devoted to the normal work for which the employee was employed, an express written contract or unwritten contract, or a practice or custom. Jackson v. Northwest Air Lines, D. C. Minn., 76 F. Supp. 212. The court therefore had jurisdiction of the action and properly denied defendant's motion to dismiss."

In *Mauro v. Malcolm M. Slaughter & Co., supra,* the United States District Court in New York, discussing the application of the Portal-to-Portal Act of 1947 to non-portal claims, stated (14 Labor Cases, par. 64,299 at p. 72,720):

"It is to be noted, at the outset, that there is no claim here except for overtime and liquidated dam-

> ages customarily and usually sought for hours actually worked, and not for any travel or preparation, or walking or preliminary or postliminary time claimed similar to that sought to be recovered in *Jewell Ridge Coal Co. v. Local No. 6167 U. M. W.*, 325 U. S. 161, and *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680. The purpose not to outlaw a claim such as here made is obvious from a reading of the act which states that it is to 'relieve employers from *certain liabilities*' (obviously not all) and of section 1 of the Portal-to-Portal Act. . . . That a claim such as the present was not intended to be barred is, I think, obvious from the President's message accompanying his approval of the Act."

As the quotations from the President's message and the decisions of the courts indicate, and as we have already pointed out, portal-to-portal activities are those which exist primarily for the benefit of the employee, not the employer, and which generally involve preparation for work and cleaning up after work. The services rendered by the plaintiffs herein were not portal-to-portal activities, and were neither preliminary nor postliminary to the duties they were engaged to perform. The work done by these plaintiffs was part and parcel of the employment for which they were engaged. Part of their work consisted in waiting around between active duties to perform "emergency services." In the words of the Supreme Court, the plaintiffs were "engaged to wait" and were not waiting "to be engaged."

> *Skidmore v. Swift & Co.*, 323 U. S. 134, 137, 89 L. ed. 124, 128 (1944).

It has been seen that the Portal-to-Portal Act of 1947 does not affect this type of work.

POINT IV

Plaintiffs' Services Were Compensable Under Express Contract.

The Portal-to-Portal Act of 1947, in part, provides as follows:

> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; . . ."
>
> Act of May 14, 1947, c. 52, §2, 61 Stat. 85; 29 U. S. C. A. §252.

The plaintiffs herein rendered their services under the terms of and in accordance with an express written agreement to receive overtime compensation at the rate of one and one-half times the normal rate of pay.

The defendant's substation division Order No. A-36, offered at the pretrial hearing as Plaintiffs' Exhibit No. 2, sets forth working conditions and payment of wages applicable to the plaintiffs. *Supra*, pp. 10 and 11.

In *Joshua Henry Corp. v. Mills,* 169 Fed. 2d 898 (C. C. A. 9, 1948), this Court had before it a substantially simi-

lar contract, reading in part as follows (169 Fed. 2d at 900):

> "4. Hours of Employment and overtime.
>
> Forty (40) hours shall constitute a work week, eight (8) hours per day, five (5) days per week, Monday to Friday, inclusive, between the hours of 8 a. m. and 5 p. m., except that where, as to any locality or as to any plant of any employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with agreement of the employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) a. m. Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week. . . ."

In the last mentioned case, the plaintiffs claimed overtime for one-half hours per day which was worked in addition to the 8 hour shift. The defendant contended that it was relieved from liability under the Portal-to-Portal Act by reason of the times when the employees worked only seven and one-half hours. This court rejected the defendant's contention and held that there was an express contract making the activity compensable within the meaning of the Portal-to-Portal Act. It stated (169 Fed. 2d at 900):

> "It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all 'work performed' in excess of 40 hours per week. Mills

performed 11 hours work in excess of 40 hours within the meaning of the phrase 'work performed.' He was paid for 8 hours overtime only."

Paragraph 5B (4) of Order No. A-36, herein, specifically states that 40 hours of work shall constitute the work week. It is further specifically provided in paragraph 8C that overtime shall be paid at the rate of one and one-half times the hourly rate. The instant case therefore falls directly within the facts and the holding of this Court in the *Mills* case, *supra*. It follows that an agreement to pay for overtime services is an agreement to pay for all overtime services irrespective of when those services are performed.

See also:

Devine v. Joshua Hendy Corp., 77 F. Supp. 893, 905 (U. S. D. C. Cal., 1948);

Lewellen v. Hardy-Burlingham Min. Co., 73 F. Supp. 63, 66 (U. S. D. C. Ky., 1947);

Frank v. Wilson & Co. Inc., (U. S. D. C. Ill., 1948) 14 Labor Cases, par. 64,296, p. 72,699.

In *Lewellen v. Hardy-Burlingham Min. Co., supra,* the plaintiff was employed as an industrial policeman at an agreed salary per month. He worked 104 hours per week without being paid overtime. The court held for the plaintiff and stated (73 F. Supp. at 66):

"Since the activity on account of which the plaintiff seeks overtime compensation was an activity which

was compensable under the terms of his contract of employment, in effect at the time of such activity, defendant is not relieved from liability under the provisions of Section 2 of the Portal-to-Portal Act of 1947, 29 U. S. C. A. §252.

"Under the evidence, plaintiff's claim in this action is not precluded by the provisions of Section 9 of the Portal-to-Portal Act of 1947, 29 U. S. C. A. §258."

The nature of the work for which plaintiffs were hired was, in substance, to be present and to perform their duties at all times during every work day on the premises of the defendant, or in the case of the primary service men, to leave a telephone number where they could at all times be reached in order to perform such emergency services as might be necessitated by the defendant in the operation of its business. The presence of plaintiffs on defendant's premises, available for call, was one of the most conspicuous aspects of and inseparable from their other duties.

Actually, the defendant's position at one time was not that the plaintiffs' inactive duties were not compensable, but was that plaintiffs were being compensated therefor. In 1945, the defendant submitted to the National War Labor Board a request for approval of a salary adjustment for certain hydro workers, relief headworks tenders, and other substation operators and attendants. It will be recalled that any increase in wages required the approval

of the National War Labor Board. In the said application defendant stated:

> " '10. Heretofore, certain of the Company's positions of Headworks tenders and attendants at substations classified as Group D and E have included as part of the inactive duties attached thereto the requirement that men holding such positions remain on the Company's premises or in their homes on or adjacent thereto up to twenty-four hours a day on certain days each week and over forty hours during each week. Such men have been and are paid specified salaries on a monthly basis for these positions. The Company desires to change its method of operation so as to eliminate the requirement that such employees so remain throughout such periods and to prescribe that no such employee will be required to so remain on the Company premises or in his said home more than forty hours during any work week in performing both his active and inactive duties. However, while eliminating this one inactive factor of the job of having to remain on the premises more than forty hours during any work week, the Company desires to continue to pay to each of these employees his present monthly salary, leaving the present rate changes intact.' " [R. 291, 316; Exhibit B to Defendant's Response to Plaintiffs' Request for Admission dated November 21, 1947.]

The defendant thus admitted by its application that it paid so many dollars for 24 hours per day's work and that thenceforth it wanted to pay the same number of dollars for 8 hours per day's work. While the defendant asserted that it paid for all time, active and inactive, it wished now in effect to raise the plaintiffs' pay by permit-

ting the plaintiffs to work less hours for the same pay they had theretofore been receiving.

Where overtime duties are an integral part of the employment of the employee, those activities are compensable by contract.

Marchant v. Sands Taylor & Wood Co., 75 F. Supp. 783, 787 (U. S. D. C. Mass., 1948);

Green v. LeVan, (U. S. D. C. Tenn., 1948) 15 Labor Cases par. 64,777, p. 74,479.

In the *Marchant* case, *supra,* the court said at page 787:

> "Defendant's contention that Section 2 (a) of the Portal-to-Portal Act exempts it from liability is without merit. The activities of the plaintiff embraced in the claimed overtime here were compensable by contract with his employer. They were activities he was required to perform by his contract of employment and there is no reason why, if he is entitled to the benefits of the Fair Labor Standards Act, he should not be paid for them. There is nothing in this section of the Portal-to-Portal Act that relieves the employer here from payment."

Even without a specific agreement to pay for overtime entered into between the employer and the employees, there is in all employment relations a contract to pay overtime for work in excess of 40 hours per week by reason of the fact of the incorporation into every contractual relationship of the provisions of the Fair Labor Standards Act.

Conwell v. Central Missouri Tel. Co., 74 F. Supp. 542 (U. S. D. C. Mo., 1947), 76 F. Supp. 398 (U. S. D. C. Mo., 1948), aff'd 170 Fed. 2d 641 (C. C. A. 8, 1948).

POINT V

Plaintiffs' Services Were Compensable Under Custom or Practice.

The Portal-to-Portal Act of 1947 provides in part as follows:

> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—
>
> * * * * * * * *
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."
>
> Act of May 14, 1947, c. 52, §2, 61 Stat. 85; 29 U. S. C. A. §252.

The plaintiffs herein rendered and the defendant accepted their services under a general custom and practice that all of the plaintiffs' activities on behalf of and de-

voted to the benefit of the defendant were to be paid for by a weekly or monthly salary [R. 111]. The defendant contended below that certain of the work of the plaintiffs was "inactive" and therefore not compensable [R. 137, 139, 143]. However, the defendant also contended below that so-called "active" duties of plaintiffs could be performed in between two to five hours per day, but that in evaluating the employment as a whole, the services of the plaintiffs, that is both the "active" and "inactive" duties were the equivalent of 8 hours per day [R. 140, 143]. The defendant by its own admission, therefore, was paying the plaintiffs a fixed wage not only for what the defendant chose to designate "active" duties, but was also paying plaintiffs for so-called "inactive" duties. A custom and practice was thereby established by the plaintiffs to pay for all work irrespective of the nature and description of the constituent elements constituting and making up the totality of the efforts expended by the plaintiffs.

Under the circumstances, therefore, it is clear that plaintiffs' services were compensable under custom or practice.

Frank v. Wilson & Co., Inc., (U. S. D. C. Ill., 1948) 14 Labor Cases par. 64,296, p. 72,699;

Central Missouri Tel. Co. v. Conwell, 170 F. 2d 641 (C. C. A. 8, 1948), aff'g 76 F. Supp. 398 (U. S. D. C. Mo., 1948);

Mauro v. Malcolm M. Slaughter & Co., (U. S. D. C. N. Y., 1948) 14 Labor Cases par. 64,299, p. 72,715.

POINT VI

Defendant Was Not Relieved of Its Obligation to Compensate Plaintiffs for Their Work Under the Provisions of Section 9 of the Portal-to-Portal Act.

The Portal-to-Portal Act of 1947, in part, provides as follows:

> "In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."
>
> Act of May 14, 1947, c. 52, §9, 61 Stat. 88; 29 U. S. C. A. §258.

In order to come within the provisions of Section 9 of the Portal-to-Portal Act, the defendant must meet all of the requirements of the statute. It must plead and prove

that it acted (1) in good faith, (2) in conformity with, and (3) in reliance on, (4) any administrative regulation, order, ruling, approval or interpretation of any *agency* of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belongs.

Burke v. Mesta Machine Co., 79 F. Supp. 588, 606 (U. S. D. C. Pa., 1948);

General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, §790.13, 12 F. Reg. 225, p. 7655 (Nov. 18, 1947).*

In *Burke v. Mesta Machine Co., supra,* the court stated (79 F. Supp. at 606):

> "Section 9 requires by its specific terms that defendant must plead and prove that the omission to pay plaintiffs according to the Fair Labor Standards Act was (1) in good faith, (2) in conformity with, and (3) in reliance upon, (4) any administrative regulation, order, ruling, approval or interpretation of any agency of the United States or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Thus, the burden of proof is placed specifically upon defendant, and that burden must be sustained by defendant with respect to each of the four requirements."

---

*Hereinafter for convenience termed "General Statement."

In the "General Statement" it is stated (Section 790.13):

> ". . . In all cases, however, the act or omission complained of must be both 'in conformity with' and 'in reliance on' the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy, as the case may be, and such conformance and reliance and such act or omission must be 'in good faith.'"

The defendant's answer herein alleges reliance on paragraphs 6, 7 and 8 of Interpretative Bulletin No. 13 issued by the Wage and Hour Administrator [R. 158, 159, 160]. These paragraphs, in substance, deal with the problem of waiting time as "work" within the meaning of the Fair Labor Standards Act. More particularly, paragraph 8 of said Bulletin, in part, provides [R. 160]:

> "8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular working hours to furnish emergency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked."

Interpretative Bulletin No. 13, and more particularly paragraph 8 thereof, was, as early as 1944, specifically construed by the Supreme Court in *Skidmore v. Swift & Co.*, 323 U. S. 134, 89 L. ed. 124 (1944). There, the Supreme Court held that the time the plaintiffs were required to remain on the premises of the employer was compensable working time, since the waiting or confinement of the employees to the premises of the employer was for the benefit of the latter, and since the duties of the employees

did not fall within the examples set forth in the said Interpretative Bulletin.

It is not to be supposed that defendant had no knowledge of the construction given Interpretative Bulletin No. 13 by the United States Supreme Court. Defendant cannot assert good faith in purportedly relying on the Bulletin. Good faith requires honesty of intention and no knowledge of circumstances which would throw doubt on the employer's honesty of action.

General Statement, Sec. 790.15.

The construction of the Bulletin to the advantage of the defendant, and the purpose intended to be served by it without reference to the holding of the United States Supreme Court in the *Skidmore* case, is in itself an indication of the lack of the good faith required by the statute. It is not good faith within the meaning of Section 9 to rely on rulings which are favorable to the defendant when there is knowledge of circumstances in conflict with the rulings.

Glowienke v. Hawaiian Dredging Co., (U. S. D. C. Ill., 1948) 14 Labor Cases par. 64,343, p. 72,867.

The requirement that the employer act "in conformity with" the administrative regulation is just as important an element of Section 9 as any other requirement. Inasmuch as the facts of plaintiffs' employment here do not specifically fall within any of the examples given in the said Interpretative Bulletin, the defense of the defendant in this connection must fall.

Central Missouri Tel. Co. v. Conwell, 170 Fed. 2d 641, 648 (C. C. A. 8, 1948).

In the last mentioned case the employees were switchboard operators who were on duty eleven hours per night but were paid for only eight hours. During all the period they were on duty, however, they were required to respond to calls. The employer sought to rely, as the defendant does here, upon the above cited Interpretative Bulletin. The court rejected the defense asserted by defendant, stating (170 Fed. 2d at 648):

> "We think the trial court correctly held that Bulletin No. 13, referred to in the record, did not describe the conditions under which plaintiffs were working at their respective stations, and hence, defendant was not exonerated from liability."

The defendant further alleged, in support of its defense under Section 9, that it relied upon a decision of the National War Labor Board denying an increase in pay for employees of The Pacific Gas and Electric Co., another employer, who allegedly were performing duties similar to the plaintiffs [R. 160-165]. The defendant cannot in good faith assert reliance on such a decision because there the National War Labor Board was not concerned with the problem of whether or not the activities of the employees were work within the meaning of the Fair Labor Standards Act, but was dealing only with the problem of whether, under wartime restrictions, the employees were entitled to an increase in pay [R. 164].

The lack of good faith of the defendant in asserting that it relied on the aforesaid decision of the National War Labor Board that the activities of the plaintiffs were not "work" is conclusively shown by the request, hereinbefore alluded to, made by defendant in 1945 to the National War Labor Board requesting permission to elimi-

nate the requirement that the plaintiffs remain on the premises twenty-four hours a day for the same pay which they had theretofore been earning. The defendant by this act gave evidence of its recognition of the fact that the plaintiffs were at all times performing work during their twenty-four hour tour of duty for which they received compensation. Otherwise, there would have been no necessity for the defendant to petition the National War Labor Board for what it regarded as an increase of pay if the employees were to receive the same salary for an eight-hour day as they received for working twenty-four hours per day. (*Supra,* p. 35.)

Defendant further offered, in support of its defense under Section 9, purported reliance on a public relations radio broadcast by the Southern California representative of the Administrator of the Fair Labor Standards Act to the effect that the defendant was operating in "complete compliance with the Act."

Section 9 is clear in its requirement that there be an administrative regulation, order, ruling, approval or interpretation of an *agency* of the United States. It is not to be supposed that in setting up the availability of the statute as a defense to actions for overtime, there was any intention to elevate the unofficial statements of local officials to the dignity of an administrative ruling of an agency of the United States.

Jackson v. Northwest Air Lines, Inc., 76 F. Supp. 121, 127 (U. S. D. C. Minn., 1948);

Kerew v. Emerson Radio & Phonograph Corp., 76 F. Supp. 197, 198 (U. S. D. C. N. Y., 1947);

Bauler v. Pressed Steel Car Co., 81 F. Supp. 172, 176 (U. S. D. C. Ill., 1948);

Burke v. Mesta Machine Co., 79 F. Supp. 588, 608 (U. S. D. C. Pa., 1948);

Semeria v. Gatto, 75 N. Y. S. 2d 140 (S. Ct. N. Y., 1947);

General Statement, Section 790.19.

The terms "Agency of the United States" are discussed in Section 790.19 of the "General Statement." In subparagraphs (b) and (c) of said section, it is stated:

"(b) The Portal Act contains no comprehensive definition of 'agency' as used in sections 9 and 10, but an indication of the meaning intended by Congress may be found in section 10. In that section, where the 'agency' whose regulation, order, ruling, approval, interpretation, administrative practice, or enforcement policy may be relied on is confined to 'the agency of the United States' specified in the section, the Act expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved. Similarly, the definitions of 'agency' in other Federal statutes indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the real power to act for the Government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the Government establishment. Furthermore, it appears from the statement of the managers on the part of the House, accompany the Conference Committee Report, that the term 'agency' as appearing in the Portal Act was employed in this sense. As there stated (p. 16), the regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies relied upon and conformed with *'must be those of an "agency" and not of an individual officer or employee of the agency. Thus, if inspector A tells the employer that the agency interpretation is that the employer is not subject to the [Fair Labor Standards] Act, the employer is not relieved from*

liability, despite his reliance in good faith on such interpretation, unless it is in fact the interpretation of the agency.' Similarly, the chairman of the Senate Judiciary Committee, in explaining the conference agreement to the Senate, made the following statement concerning the 'good faith' defense: 'It will be noted that the relief from liability must be based on a ruling of a Federal agency, and not a minor official thereof. I, therefore, feel that the legitimate interest of labor will be adequately protected under such a provision, since the agency will exercise due care in the issuance of any such ruling.'

"(c) Accordingly, the defense provided by sections 9 and 10 of the Portal Act is restricted to those situations where the employer can show that the regulation, order, ruling, approval, interpretation, administrative practice, or enforcement policy with which he conformed and on which he relied in good faith was actually that of the authority vested with power to issue or adopt regulations, orders, rulings, approvals, interpretations, administrative practices, or enforcement policies of a final nature as the official act or policy of the agency. Statements made by other officials or employees are not regulations, orders, rulings, approvals, interpretations, administrative practices, or enforcement policies of the agency within the meaning of sections 9 and 10."

In *Burke v. Mesta Machine Co., supra,* the court stated (79 F. Supp. at 609):

"The words of Section 9 further strengthen the conclusion drawn from the reports and debates that Congress was referring to rulings by authorized and responsible officials of federal agencies which could be termed rulings of the agency. Not only does the Section refer to 'any administrative regulations, order,

"etc.," of any agency of the United States,' but it also goes on to refer to 'any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged.'

"It seems that Congress acted on the basis of testimony by the Administrator that only he or persons to whom he had specifically delegated the authority to do so were empowered to issue rulings under the Fair Labor Standards Act, and it was with reference to authoritative rulings of this nature that Section 9 speaks. The well settled administrative practice within the Wage and Hour Division is that the Administrator or a Deputy Administrator (subsequently the Solicitor of Labor) to whom the power has been expressly delegated by the Administrator, could issue Interpretative Bulletins, Opinion Letters, Regulations, Rulings or any other of the multitudinous documents making up the administrative literature under the Fair Labor Standards Act."

The Southern California representative of the Wage and Hour Administrator, upon whose statements the defendant seeks to rely, had no authority nor was it his purpose to make or issue interpretations of the Fair Labor Standards Act of 1938 [R. 298-301]. The defendant consequently may not utilize the unofficial statements of the Southern California representative as a basis for asserting that it failed to pay overtime in good faith reliance on an Administrative ruling.

It is, of course, obvious that the defendant must not only plead good faith but must prove that good faith by more than its self-serving assertions which are denied [R. 298-301].

Burke v. Mesta Machine Co., 79 F. Supp. 588, 612 (U. S. D. C. Pa., 1948).

POINT VII

Defendant May Not Be Relieved of Liability for Liquidated Damages Under the Provisions of Section 11 of the Portal-to-Portal Act.

The Portal-to-Portal Act of 1947 in part provides as follows:

> "In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title."
>
> Act of May 14, 1947, c. 52, §11, 61 Stat. 89; 29 U. S. C. A. §260.

While this statute is not as specific in its requirements as Section 9, it is clear that in order for an employer to bring his acts within the protective scope of the statute he must plead and prove two essential elements, namely: (1) that his act was in good faith; and (2) that he had reasonable grounds for believing that his act was not a violation of the Fair Labor Standards Act of 1938.

It is not enough for an employer merely to make assertions to the effect that he has acted in good faith and that he had reasonable grounds for so acting.

General Statement, Section 790.22.

A defense under Section 11 is not established where an employer asserts reliance on certain favorable rulings when he has knowledge of the existence of contrary rulings.

Glowienke v. Hawaiian Dredging Co., (U. S. D. C. Ill. 1948) 14 Labor Cases, par. 64,343, p. 72,-867.

Defendant cannot in good faith assert reliance on the provisions of Interpretative Bulletin No. 13 when it knew or should have known of the holding of the United States Supreme Court in the *Skidmore* case.

It is, of course, idle to discuss the question of compliance by the defendant with Section 11 on the basis of the bare order of the lower court dismissing the action of plaintiffs. Whether or not the defendant could, to the satisfaction of the court, establish its right to be relieved from liquidated damages is a matter which can only be determined upon a full trial of the case. Good faith is a mixed question of fact and law which may be determined only by objective tests.

General Statement, Section 790.22.

POINT VIII

If Plaintiffs Are Entitled to Recover Under an Express Contract, Application of the Portal-to-Portal Act to Bar Their Claims Would Be Unconstitutional.

In view of the holding of this court in *Potter v. Kaiser Company, Inc.,* (C. C. A. 9, 1949) 16 Labor Cases, par. 64,939, p. 74,990, upholding the constitutionality of the Portal-to-Portal Act of 1949, it is not intended to discuss or argue fully the constitutionality of the statute when applied retroactively. The point is presented here (1) to save the rights of plaintiffs pending a final determination of the question by the United States Supreme Court, and (2) to distinguish the instant case from the *Potter* case, *supra,* on the ground that in the instant case plaintiffs may be entitled to recover upon an express contract irrespective of statute.

1. In summary, plaintiffs contend the Portal-to-Portal Act of 1947 is unconstitutional when applied retroactively for the following reasons:

A.

It takes property of plaintiffs without due process of law in violation of the Fifth Amendment.

Osborn v. Nicholson, 80 U. S. 546, 20 L. ed. 689 (1872);

Forbes Pioneer Boat Line v. Everglades Drainage District, 258 U. S. 338, 66 L. ed. 647 (1922);

Hathorn v. Calef, 2 Wall. 10, 17 L. ed. 776 (1865);

Pacific Mail Steamship v. Joliffe, 2 Wall. 450, 17 L. ed. 805 (1865);

Monongahela Navigation Co. v. United States, 148 U. S. 10, 37 L. ed. 463 (1893);

Coombes v. Getz, 285 U. S. 434, 76 L. ed. 866 (1932);

Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434 (1934);

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593 (1935).

B.

Retroactive application of the Portal-to-Portal Act is an unconstitutional attempt by Congress to exercise the judicial power which is vested in the courts.

United States v. Klein, 13 Wall. 128, 20 L. ed. 519 (1872).

C.

Even though the Portal-to-Portal Act of 1947 may constitutionally be applied retroactively to extinguish claims for portal-to-portal activities, it cannot be so applied to wipe out claims for non-portal activities.

See:

Curtis v. McWilliams Dredging Co., (N. Y. City Court 1948) 14 Labor Cases, par. 64,352, p. 72,890.

2. Section 2 of the Portal-to-Portal Act of 1947 was intended to affect only purely statutory claims, or portal-to-portal activities, not based upon express contract.

Government's Brief as Intervenor, *Potter v. Kaiser Co., Inc.,* (No. 11889, C. C. A. 9, 1949), pages 7 and 8.

See also:

Curtis v. McWilliams Dredging Co., supra;

Sveltik v. Vultee Aircraft Corp., (U. S. D. C. Tex., 1947) 13 Labor Cases, par. 64,063, p. 71,980.

Conclusion.

It is respectfully submitted that the important and complicated issues raised in the instant cases must be tried by a court and jury, and that it would be most helpful if this Court, in reversing the judgment below, would indicate the correct principles of law to be applied.

Respectfully submitted,

David Sokol and
Pacht, Warne, Ross & Bernhard, and
Isaac Pacht,
Bernard Reich,
Henry Attias,
Attorneys for Plaintiffs-Appellants.